

# State of South Dakota

SEVENTY-SECOND SESSION  
LEGISLATIVE ASSEMBLY, 1997

549A0761

SENATE JUDICIARY COMMITTEE ENGROSSED

NO. **SB241** - 2/18/97

Introduced by: Senators Flowers, Reedy, and Rounds and Representatives Fischer-Clemens,  
Haley, Lucas, and Schrempp

1 FOR AN ACT ENTITLED, An Act to provide for a declaration of preferences and power of  
2 attorney for mental illness treatment decisions.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

5 (1) "Attending physician," the physician who has the primary responsibility for the mental  
6 illness treatment of a person;

7 (2) "Attorney-in-fact," any person designated by a principal through a power of attorney  
8 to make decisions about mental illness treatment for the principal in accordance with  
9 a declaration for mental illness treatment;

10 (3) "Declaration for mental illness treatment," or "declaration," any document declaring  
11 preferences or instructions regarding mental illness treatment;

12 (4) "Power of attorney for mental illness treatment," any document that authorizes an  
13 attorney-in-fact to make a decision about mental illness treatment or to consent to  
14 mental illness treatment on behalf of its principal;

15 (5) "Health care facility," a health care facility as defined in § 34-12-1.1 and the Human

Services Center;

(6) "Incapable," the condition of a person whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that, in the opinion of the court or in the opinion of two physicians, one of whom is the treating psychiatrist, if any, the person currently lacks the capacity to make mental illness treatment decisions;

(7) "Mental illness treatment," convulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a health care facility for not more than thirty days for care or treatment of mental illness;

(8) "Principal," any person who gives authority to an attorney-in-fact to make decisions about mental illness treatment for the person.

Section 2. Any adult of sound mind may make a declaration of preferences or instructions for mental illness treatment. The preferences or instructions may include consent to mental illness treatment. A declaration for mental illness treatment continues in effect for three years or until revoked, whichever is first. If a declaration for mental illness treatment has been invoked and is in effect on the date that the declaration is to expire, the declaration remains effective until there is a subsequent determination by the attending physician, treating psychiatrist, or the circuit court that the principal is capable of giving informed consent.

Section 3. By means of a power of attorney for mental illness treatment, any adult of sound mind may designate a competent adult to act as attorney-in-fact to make decisions about mental illness treatment. An alternative attorney-in-fact may also be designated to act as attorney-in-fact if the original designee is unable or unwilling to act at any time. The authority of an attorney-in-fact and any alternative attorney-in-fact continues under the power of attorney for mental illness treatment for three years, until it is revoked by the principal, or until the attorney-in-fact withdraws, whichever is first. If an attorney-in-fact is acting for the principal on the date the

1 power of attorney is to expire, the power of attorney remains in effect until the principal is no  
2 longer incapable.

3 An attorney-in-fact who has accepted the appointment in writing may make decisions about  
4 mental illness treatment on behalf of the principal only when the principal is incapable. The  
5 decisions must be consistent with any desires the principal has expressed in the declaration for  
6 mental illness treatment.

7 Section 4. A declaration and power of attorney for mental illness treatment is effective only  
8 if it is signed by the principal and two competent adult witnesses. The witnesses shall attest that  
9 the principal is known to them, that the principal signed the declaration and power of attorney  
10 for mental illness treatment in their presence, and that the principal appears to be of sound mind  
11 and not under duress, fraud, or undue influence. No person specified in section 16 of this Act  
12 may act as witnesses.

13 Section 5. A declaration and a power of attorney for mental illness treatment shall be filed  
14 with the principal's attending physician or other mental illness treatment provider, and they  
15 remain valid until they expire or are revoked. The physician or provider shall continue to obtain  
16 the principal's informed consent to all mental illness treatment decisions if the principal is capable  
17 of providing informed consent. The physician or provider shall act in accordance with the  
18 declaration and with the informed consent of the attorney-in-fact if the principal is found to be  
19 incapable.

20 Section 6. The attorney-in-fact may not make mental illness treatment decisions unless the  
21 principal is incapable. The attorney-in-fact is not, as a result of acting in that capacity, personally  
22 liable for the cost of treatment provided to the principal.

23 Section 7. Except to the extent that the right is limited by the declaration or any federal law,  
24 an attorney-in-fact has the same right as the principal to receive information regarding the  
25 proposed mental illness treatment and to receive, review, and consent to disclosure of medical

1 records relating to that treatment. The right of access does not waive any evidentiary privilege.

2 Section 8. In exercising authority under the declaration, the attorney-in-fact shall act  
3 consistently with the desires of the principal as expressed in the declaration. If the principal's  
4 desires are not expressed in the declaration and are not otherwise known by the attorney-in-fact,  
5 the attorney-in-fact shall act in what the attorney-in-fact in good faith believes to be the best  
6 interests of the principal.

7 Section 9. An attorney-in-fact is not subject to criminal prosecution, civil liability, or  
8 professional disciplinary action for any action taken in good faith pursuant to a declaration for  
9 mental illness treatment.

10 Section 10. A person may not be required to execute or to refrain from executing a  
11 declaration as a criterion for insurance, as a condition for receiving mental or physical health  
12 services, or as a condition of discharge from a health care facility.

13 Section 11. Upon being presented with a declaration and a power of attorney for mental  
14 illness treatment, an attending physician or other provider shall make the declaration and power  
15 of attorney a part of the principal's medical record. When acting under authority of a declaration  
16 and power of attorney, a physician or provider shall comply with them to the fullest extent  
17 possible, consistent with reasonable medical practice, the availability of treatments requested, and  
18 applicable law.

19 If the physician or other provider is unwilling at any time to comply with the declaration and  
20 power of attorney, the physician or provider may withdraw from providing treatment consistent  
21 with the exercise of independent medical judgment. A physician or provider who withdraws shall  
22 promptly notify the principal and the attorney-in-fact and shall document the notification in the  
23 principal's medical record.

24 Section 12. The attending physician or provider may subject the principal to mental illness  
25 treatment in a manner contrary to the principal's wishes as expressed in a declaration for mental

1 illness treatment only if the principal is a patient of the Human Services Center pursuant to Title  
2 27A or § 23A-46-10 or treatment is authorized by the circuit court or in cases of emergency  
3 endangering life or health. A declaration does not limit any authority either to take a person into  
4 custody or to admit, retain, or treat a person in a health care facility.

5 Section 13. A principal who is capable may revoke a declaration and power of attorney for  
6 mental illness treatment in whole or in part at any time. A revocation is effective when a capable  
7 principal communicates the revocation to the attending physician or other provider. The  
8 attending physician or other provider shall note the revocation in the principal's medical record.

9 Section 14. An attending physician or other provider who administers or does not administer  
10 mental illness treatment according to and in good faith reliance on the validity of a declaration  
11 and with the informed consent of the attorney-in-fact is not subject to criminal prosecution, civil  
12 liability, or professional disciplinary action.

13 Section 15. None of the following may serve as attorney-in-fact:

- 14 (1) The attending physician or other mental illness treatment provider or an employee of  
15 the physician or provider if the physician, provider, or employee is unrelated to the  
16 principal by blood, marriage, or adoption; or
- 17 (2) An owner, operator, or employee of a health care facility in which the principal is a  
18 patient or resident if the owner, operator, or employee is unrelated to the principal by  
19 blood, marriage, or adoption.

20 Section 16. None of the following may serve as a witness to the signing of a declaration and  
21 power of attorney for mental illness treatment:

- 22 (1) The attending physician or mental illness treatment provider or a relative of the  
23 physician or provider;
- 24 (2) An owner or operator or a relative of an owner or operator of a health care facility  
25 in which the principal is a patient or resident; or

(3) A person related to the principal by blood, marriage, or adoption.

Section 17. An attorney-in-fact may withdraw by giving notice to the principal. If the principal is incapable, the attorney-in-fact may withdraw by giving notice to the attending physician or mental illness treatment provider. The attending physician or provider shall note the withdrawal in the principal's medical record.

A person who has withdrawn under the provisions of this section may rescind the withdrawal by executing an acceptance after the date of the withdrawal. The acceptance shall be in the same form as provided by section 18 of this Act for accepting an appointment as attorney-in-fact. A person who rescinds a withdrawal shall give notice to the principal if the principal is capable or to the principal's attending physician or mental illness treatment provider if the principal is incapable.

Section 18. A declaration and power of attorney for mental illness treatment shall be in substantially the following form:

DECLARATION AND POWER OF ATTORNEY  
FOR MENTAL HEALTH TREATMENT

I, \_\_\_\_\_, being an adult of sound mind, willfully and voluntarily make this declaration for mental illness treatment to be followed if it is determined by a court or by two physicians that my ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that I lack the capacity to consent to mental illness treatment. "Mental illness treatment" means convulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a health care facility for up to thirty days.

I understand that I may become incapable of giving informed consent for mental illness treatment due to the symptoms of a diagnosed mental disorder. These symptoms may include:

\_\_\_\_\_

1 \_\_\_\_\_

2 PSYCHOTROPIC MEDICATIONS

3 If I become incapable of giving informed consent for mental illness treatment, my wishes  
4 regarding psychotropic medications are as follows:

5 \_\_\_\_\_ I consent to the administration of psychotropic medications.

6 Comments:

7 \_\_\_\_\_

8 \_\_\_\_\_

9 CONVULSIVE TREATMENT

10 If I become incapable of giving informed consent for mental illness treatment, my wishes  
11 regarding convulsive treatment are as follows:

12 \_\_\_\_\_ I consent to the administration of convulsive treatment.

13 Comments:

14 \_\_\_\_\_

15 \_\_\_\_\_

16 ADMISSION TO AND RETENTION IN FACILITY

17 If I become incapable of giving informed consent for mental illness treatment, my wishes  
18 regarding admission to and retention in a health care facility for mental illness treatment are as  
19 follows:

20 \_\_\_\_\_ I consent to being admitted to a health care facility for mental illness treatment.

21 This directive does not provide consent to retain me in a facility for more than thirty days.

22 Comments:

23 \_\_\_\_\_

24 \_\_\_\_\_

25 ADDITIONAL REFERENCES OR INSTRUCTIONS

1 \_\_\_\_\_  
2 \_\_\_\_\_  
3 \_\_\_\_\_

4 POWER OF ATTORNEY FOR MENTAL HEALTH TREATMENT

5 I hereby appoint the following person to act as my attorney-in-fact to make decisions  
6 regarding my mental illness treatment if I become incapable of giving informed consent for that  
7 treatment:

8 NAME \_\_\_\_\_

9 ADDRESS \_\_\_\_\_

10 TELEPHONE NUMBER \_\_\_\_\_

11 If the person named refuses or is unable to act on my behalf or if I revoke that person's  
12 authority to act as my attorney-in-fact, I authorize the following person to act as my attorney-in-  
13 fact:

14 NAME \_\_\_\_\_

15 ADDRESS \_\_\_\_\_

16 TELEPHONE NUMBER \_\_\_\_\_

17 My attorney-in-fact is authorized to make decisions that are consistent with the wishes I have  
18 expressed in my declaration for mental illness treatment or, if not expressed, as are otherwise  
19 known to my attorney-in-fact. If my wishes are not expressed and are not otherwise known by  
20 my attorney-in-fact, my attorney-in-fact is to act in what he or she believes to be my best  
21 interests.

22 \_\_\_\_\_

23 (Signature of Principal/Date)

24 AFFIRMATION OF WITNESSES

25 We affirm that the principal is personally known to us, that the principal has read the



1 accompanying Notice to Person Making a Declaration and Power of Attorney for Mental Illness  
2 Treatment or has had the notice read and explained, that the principal signed or acknowledged  
3 the principal's signature on this declaration and power of attorney for mental illness treatment  
4 in our presence, that the principal appears to be of sound mind and not under duress, fraud, or  
5 undue influence, that neither of us is:

6 A person appointed as an attorney-in-fact by this document;

7 The principal's attending physician or mental health service provider or a relative of the  
8 physician or provider;

9 The owner or operator or a relative of an owner or operator of a facility in which the  
10 principal is a patient or resident; or

11 A person related to the principal by blood, marriage, or adoption.

12 Witnessed by:

13 \_\_\_\_\_

14 (Signature of Witness/Date) (Printed Name of Witness)

15 \_\_\_\_\_

16 (Signature of Witness/Date) (Printed Name of Witness)

17 ACCEPTANCE OF APPOINTMENT AS ATTORNEY-IN-FACT

18 I accept this appointment and agree to serve as attorney-in-fact to make decisions about  
19 mental illness treatment for the principal. I understand that I have a duty to act in a manner that  
20 is consistent with the desires of the principal as expressed in this appointment. I understand that  
21 this document gives me authority to make decisions about mental illness treatment only while the  
22 principal is incapable, as determined by a court or two physicians. I understand that the principal  
23 may revoke this declaration in whole or in part at any time and in any manner if the principal is  
24 capable.

25 \_\_\_\_\_

(Signature of Attorney-in-fact/Date) (Printed name)

\_\_\_\_\_

(Signature of Alternative Attorney-in-fact/Date) (Printed name)

NOTICE TO PERSON MAKING A DECLARATION AND  
POWER OF ATTORNEY FOR MENTAL ILLNESS TREATMENT

This is an important legal document. It creates a declaration for mental illness treatment and names an attorney-in-fact and an alternative attorney-in-fact to make mental health treatment decisions for you if you become incapable. Before signing this document, you should know these important facts:

This document allows you to make decisions in advance about three types of mental illness treatment: psychotropic medication, convulsive therapy, and short-term (up to thirty days) admission to a treatment facility. It is very important that you declare your instructions carefully and review this document regularly. The instructions that you include in this declaration will be followed only if a court or two physicians believe that you are incapable of making treatment decisions. Otherwise, you will be considered capable to give consent for the treatments.

You may also appoint a person as your attorney-in-fact to make these treatment decisions for you if you become incapable. Preference shall be given to immediate family members in the following order: spouse, parent, adult child, and sibling. It is important that your attorney-in-fact be knowledgeable about mental illness issues and the decisions you have made. The person you appoint has a duty to act in a manner that is consistent with your desires as stated in this document. If your desires are not stated or otherwise made known to the attorney-in-fact, the attorney-in-fact has a duty to act in a manner consistent with what the person in good faith believes to be your best interest. For the appointment to be effective, the person you appoint must accept the appointment in writing. The person also has the right to withdraw from acting as your attorney-in-fact at any time.

1        This document will continue in effect for three years unless you become incapable of  
2        participating in mental illness treatment decisions. If this occurs, the directive will continue in  
3        effect until you are no longer incapable.

4        You have the right to revoke this document in whole or in part at any time you have not been  
5        determined to be incapable. **YOU MAY NOT REVOKE THIS DECLARATION AND POWER**  
6        **OF ATTORNEY WHEN YOU ARE CONSIDERED INCAPABLE BY A COURT OR TWO**  
7        **PHYSICIANS.** A revocation is effective when it is communicated to your attending physician  
8        or other mental health care provider.

9        If there is anything in this document that you do not understand, you should ask a lawyer to  
10       explain it to you. This declaration will not be valid unless it is signed by two qualified witnesses  
11       who are personally known to you and who are present when you sign or acknowledge your  
12       signature.

13       Section 19. That § 27A-12-3.15 be amended to read as follows:

14       27A-12-3.15. If the court finds by clear and convincing evidence that the person is incapable  
15       of consenting to treatment with psychotropic medication because ~~his~~ the person's judgment is  
16       so affected by ~~his~~ mental illness that ~~he~~ the person lacks the capacity to make a competent,  
17       voluntary, and knowing decision concerning the medication and the administration of the  
18       recommended psychotropic medication is essential under the criteria in § 27A-12-3.13, the court  
19       ~~may exercise a substituted judgment on~~ may order the administration of psychotropic medication.

1    **BILL HISTORY**

2    2/3/97 First read in Senate and referred to Judiciary. S.J. 283

3    2/14/97 Scheduled for Committee hearing on this date.

4    2/14/97 Judiciary Do Pass Amended, AYES 5, NAYS 0. S.J. 467

5    2/14/97 Judiciary Title Amended.